Supreme Court, U. S.
FILED
AUG 20 1980
MICHAEL RODAK, JR., CLERK

No. 80–18

In The

Supreme Court of the United States

October Term, 1980

UNIVERSAL WASTE CONTROL and
WASTE MANAGEMENT, INC.,
Petitioners,

v.

WESTERN WASTE SERVICE SYSTEMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO UNIVERSAL WASTE CONTROL'S PETITION FOR WRIT OF CERTIORARI

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The fundamental question presented in this matter is simple: do the federal district courts have authority to make pretrial determinations based on all the evidence submitted by the parties of the essential facts necessary to establish the interstate commerce requirements for jurisdiction under the Sherman Act? Respondent, Western Waste Service Systems, recognizes this issue precisely when it states:

> The Ninth Circuit refused to make a factual finding as to the Sherman Act jurisdiction issues raised by the evidence at this stage of the proceedings, but rather accepted the allegations of the Complaint as supplemented by the evidence as true. (Brief in Opposition, p. 8).

That is exactly what the Ninth Circuit did. The Ninth Circuit is wrong. Respondent, as did the Ninth Circuit, has failed to distinguish between a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) and a motion to dismiss for failure to state a claim under Rule 12(b)(6). A Rule 12(b)(1) motion to dismiss contemplates and permits the district court to make a factual finding, despite conflicting evidence, concerning whether it has jurisdiction to proceed.

While respondent might believe that its allegations and evidence submitted to the district court would support a finding of substantial effect on interstate commerce (Brief in Response, p. 5), the district court found otherwise based on all the evidence submitted.

There is substantial authority for the proposition that the district court has a duty under Rule 12(b)(1) to make an early factual determination of its subject matter jurisdiction. This includes resolving disputed issues of facts. Petition for Writ of Certiorari § II.

Respondent is in error when it states that the only circuit decision conflicting with the decision underlying this petition is a non-antitrust case, *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir. 1980). As stated in § II of the Petition and the authorities cited therein, there is substantial conflict between the circuits on this issue. Most of the cases where conflicting results were reached are antitrust cases. That conflict is exacerbated by the Ninth Circuit's opinion in this case. Furthermore, even if there were no conflict with another antitrust case, the question fundamentally is not solely one of antitrust law

but instead one of more general constitutional proportions—does the district court have subject matter jurisdiction to proceed?

Finally, respondent contends that Sherman Act cases are so complex that it is impossible to extricate the jurisdictional issue from the substantive issues. Even the Ninth Circuit disagrees with that statement. In *Gough v. Rossmoore Corp.*, 487 F.2d 373 (9th Cir. 1973), the Ninth Circuit explained at length how in cases such as this one those issues are separable and should be separated.

For the foregoing reasons, together with those stated in the petition itself, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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August, 1980

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

PAUL G. ULRICH, being first duly sworn, upon his oath deposes and says that he is a member of the Bar of this Court and one of the counsel of record for petitioners in this cause, that on this 18th day of August, 1980, he mailed three copies of the Reply to Brief in Opposition to Universal Waste Control's Petition for Writ of Certiorari in this cause by depositing the Reply in the United States mail, first class postage paid, to:

P. Richard Meyer, Esq.
Henry G. Hester, Esq.
Meyer & Vucichevich
3246 North 16th Street
Phoenix, Arizona 85016,

and that he also then mailed 40 copies of the Reply to the Clerk of this Court in compliance with Supreme Court Rule 28.

_____

PAUL G. ULRICH

SUBSCRIBED AND SWORN TO before me this ____ day of August, 1980.

_____

Notary Public

My Commission Expires:

_____